86 - 1463
NO.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1986

RAY L. CORONA and
RAFAEL L. CORONA,

Petitioners,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

WHETHER THE CONSTITUTIONAL PROTECTION AGAINST DOUBLE JEOPARDY BARS A RETRIAL ON A SUPERSEDING INDICTMENT OBTAINED AFTER A HUNG JURY AND DECLARATION OF A MISTRIAL, WHERE THE SUPERSEDING INDICTMENT CHARGES THE SAME ULTIMATE OFFENSE BUT HAS MODIFIED ORIGINAL CHARGES AND ADDED NEW BUT RELATED CHARGES WHICH WERE NOT MADE A PART OF THE ORIGINAL PROSECUTION?

LIST OF INTERESTED PERSONS

The only persons having an interest in the outcome of this case are the Petitioners, their families and the United States of America.

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Petitioners, Ray L. Corona and Rafael L. Corona, respectfully pray that a writ of certiorari issue to review the judgment, opinion, and order on rehearing of the United States Court of Appeals for the Eleventh Circuit, entered in Case No. 86-5287 on December 3, 1986, and February 12, 1987, which affirmed the judgment of the United

States District Court for the Southern District of Florida denying a dismissal of the superseding indictment on double jeopardy grounds.

OPINION BELOW

The United States Court of Appeals for the Eleventh Circuit announced its opinion and judgment affirming the denial of a motion to dismiss the superseding indictment on double jeopardy grounds. That decision is reported as United States v. Corona, 804 F.2d 1568 (11th Cir. 1986). The decision is reproduced in the Appendix. The Court of Appeals denied a Petition for Panel Rehearing and Suggestion for En Banc Consideration on February 12, 1987. That order is included in the Appendix. The appellate court entered a stay of mandate in this case pending the timely filing of a Petition for Writ of

Certiorari by March 10, 1987, and continuing until disposition of the certiorari petition. A copy of that order is included in the Appendix.

JURISDICTION

Jurisdiction is invoked under 28 U.S.C. §1254(1). This petition is filed within the authorized time period following the Eleventh Circuit's order on rehearing. Sup.Ct.R. 20.1.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Fifth Amendment:

> No persons shall be ... subject for the same offense to be twice put in jeopardy of life or limb...

STATEMENT OF THE CASE

On December 11, 1984, a grand jury in the Southern District of Florida

returned a thirty-count indictment charging six defendants with a series of criminal violations arising out of an alleged marijuana enterprise which had as its purposes to import and distribute marijuana, to take control of a financial institution for the purpose of laundering marijuana proceeds, and to defraud the people of the United States and the State of Florida in connection with banking disclosures. Ray L. Corona was charged with six of those counts[1] and Rafael L. Corona was charged in four counts.[2] The four other defendants

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[1] Count 1 charged a RICO conspiracy between January 1977 through the date of the indictment (December 11, 1984); Count 2 charged a RICO enterprise on the same dates; Count 3 charged a conspiracy to import marijuana between January 1977 through March 1981; Count 4 charged importation of marijuana on December 19, 1979; and Counts 23 and 24 charged mail fraud on June 20 and November 27, 1981, respectively.

[2] Charges against Rafael L. Corona included Counts 1, 2, 23 and 24.

were charged in various related counts.

During a ten-week trial, both Coronas mounted a vigorous defense. The government withdrew Counts 3 and 4 as to Ray Corona, and Count 24 as to both Coronas, conceding inadequate proof. At the same time, the government dropped a number of allegations and the corresponding racketeering acts contained within Count 1.[3/] After lengthy jury deliberations, the jury could not reach a unanimous verdict as to either Corona. The district court subsequently declared a mistrial due to the failure of the

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3/ The only racketeering acts against the Coronas for consideration by the jury were: Racketeering Act No. 22 - Travel Act violation of December 21, 1977; Racketeering Act No. 23 - Travel Act violation on May 10, 1978; Racketeering Act No. 24 - Travel Act violation on May 16, 1979; Racketeering Act No. 41 - Mail fraud on January 19, 1978; Racketeering Act No. 42 - Mail fraud on May 19, 1978; Racketeering Act No. 43 - Mail fraud on May 7, 1979; and Racketeering Act No. 43 - Mail fraud on June 30, 1981.

jury to agree on a verdict. Of the other defendants, two were convicted and one was acquitted.

Three months after the discharge of the jury but before retrial, the government obtained a "superseding indictment." This superseding indictment, while charging the same general racketeering conspiracy and enterprise offenses, changed many of the allegations contained within the original counts[4/] and additionally increased the number of charges against the Coronas. The increased counts were not independent offenses, but arose out of the racketeering allegations originally charged. The superseding indictment reflects the following charges:

4/ All changed portions of the superseding indictment reflected information known to and possessed by government witnesses prior to the original trial.

A. Count 1 - RICO Conspiracy.

Although alleged as the same RICO conspiracy contained in Count 1 of the original indictment, the new charge substantially changes the date of the conspiracy to include mid-1976 through and including the return of the superseding indictment on December 20, 1985.5/ The superseding indictment added corporate entities to the enterprise allegations and deleted a substantial number of companies from the list. Previous defendants were alleged to be merely coconspirators, while former defendant Vaughn was eliminated totally from the indictment. References to Ray

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5/ According to the new grand jury allegations, the racketeering conspiracy existed during the original trial, notwithstanding that the principal defendant, Jose Antonio Fernandez, had pled guilty and was a government witness during that entire proceeding and no evidence was presented at the initial trial that any conspiracy was ongoing.

Corona's involvement with marijuana were deleted. Numerous racketeering acts changed, including the addition of specific acts of racketeering not contained within the original indictment and racketeering acts which differed from the original indictment. Count 1 also includes new overt acts and deletes other overt acts.

B. Count 2 - RICO Enterprise. As with Count 1, the time period during which this violation occurred was broadened from the original indictment.

C. Counts 3 through 5 - Mail Frauds Occurring on June 30, 1981, and January 3 and April 22, 1982. The superseding indictment broadened the time frame of the charged fraudulent scheme and alleged additional means of committing the offense. Count 3 is the equivalent of original Count 23. Counts 4 and 5, while alleged to be a part of

the same fraudulent scheme originally alleged, are new charges.

D. Counts 6 through 8 - Travel Act Violations. These charges did not appear in the original indictment.

During the pretrial stages of this case following the declaration of a mistrial and the return of the superseding indictment, the Coronas sought dismissal of the superseding indictment on double jeopardy and vindictive prosecution grounds. The district court denied the dismissal motion and the Coronas immediately initiated an appeal. Proceedings in the district court were stayed by the Eleventh Circuit pending disposition.

On December 3, 1986, the Eleventh Circuit, in United States v. Corona, 804 F.2d 1568 (11th Cir. 1986), affirmed the decision of the district court denying the double jeopardy dismissal. The

panel concluded that no double jeopardy violation occurs as a result of a retrial on a superseding indictment under any circumstances. The court stated, at 1570:

> We now set forth the proper application of the two principles of law to this case. Since the mistrial here as a result of the hung jury did not terminate the jeopardy which had attached to the defendants, the retrial of the defendants was not double jeopardy. Richardson v. United States, 468 U.S. at 325, 104 S.Ct. at 3086. Since the superseding indictment allowed ample time for defendants' preparation prior to retrial, it was analogous to a superseding indictment before trial and was not analogous to a superseding indictment during trial. United States v. Edwards, 777 F.2d at 649.

The rationale for the court's decision, found at 1571, is the following:

> Our conclusion that no double jeopardy problem is implicated here also comports with common sense. It has long been established that a defendant can be retried on the same charges following a mistrial. See Richardson, 468 U.S. at

> 323, 104 S.Ct. at 3085. It is also clear that one who has been either acquitted or convicted of a particular offense can nonetheless be indicted and tried on a new offense, so long as the new offense is separate from the previous charge. [footnote omitted] Therefore, it makes no sense to argue, as defendants do, that the defendants, whose trial ended in a mistrial, can be retried on the same charges, and can be retried on completely separate and additional charges, but cannot be retried on some lesser amendment of the existing charges. [footnote omitted]

It is this ruling for which certiorari review is sought. The court denied a petition for rehearing and for rehearing en banc on February 12, 1987, but granted a stay of mandate to March 10, 1987, so as to allow Petitioners the opportunity to petition this court for review of this issue of great public importance.

REASONS FOR GRANTING THE WRIT

THE CONSTITUTIONAL PROTECTION AGAINST DOUBLE JEOPARDY BARS A RETRIAL ON A SUPERSEDING INDICTMENT OBTAINED AFTER A HUNG JURY AND DECLARATION OF A MISTRIAL, WHERE THE SUPERSEDING INDICTMENT CHARGES THE SAME ULTIMATE OFFENSE BUT HAS MODIFIED ORIGINAL CHARGES AND ADDED NEW BUT RELATED CHARGES NOT A PART OF THE ORIGINAL PROSECUTION.

The constitutional protection against double jeopardy bars retrial of a defendant on a superseding indictment obtained after a hung jury and declaration of a mistrial. This conclusion is evident from an examination of the constitutional guarantee against twice being placed in jeopardy. U.S. Const. amend. V. This case presents a fundamental constitutional issue of substantial importance which, although addressed obliquely in Richardson v. United States, 468 U.S. 317, 104 S.Ct. 3081 (1984), was mischaracterized and

erroneously rejected by the appellate court below. Bottomed on the Richardson principle of "continuing jeopardy," this case concerns the extent to which an accused can be protected by the Double Jeopardy Clause when the prosecution, in an effort to secure a conviction after a hung jury, obtains a superseding indictment which modifies original charges and adds additional charges which are alleged to be a part of the original criminal scheme.

At stake in this case is the essence of our justice system, which is designed to afford to each accused person the opportunity to have the charges to which jeopardy attached determined. The same criminal justice system also is intended to protect persons from repeated governmental assault under the guise of prosecution attempts to prove again and again the core facts which are

made a part of the charges. With the decision of the Eleventh Circuit, the government has been given unfettered authority to bring defendants to trial and, if that trial is unsuccessful, to tamper with the original indictment, by changing allegations, adding counts, and blunting the accused's trial defense. The government, moreover, has received approval to alter the balance of protections afforded by the Double Jeopardy Clause in that it now can use a first trial as a test run of its case.

Contrary to constitutional considerations of double jeopardy and at odds with principles of fundamental fairness, the Court of Appeals has validated government efforts to retry the Coronas on a superseding indictment obtained after the Coronas defended the original charges during trial which ended in a hung jury. The government

action circumvents the protections of the double jeopardy clause by forcing the Coronas to trial a second time on charges which, although involving the same criminal conduct, substantially alter the case. Although the government has an absolute right to retry both Coronas as a consequence of the hung jury, the retrial must be on the original indictment as presented to the initial jury.

A. The Double Jeopardy Clause -- Protection Against Successive Prosecutions.

The Double Jeopardy Clause of the Fifth Amendment provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." This constitutional protection, which is older than the Constitution itself, see Crist v. Bretz, 437 U.S. 28, 32-35, 98 S.Ct. 2156, 2159-2160 (1978), embodies the guarantee of the common-law

plea of former jeopardy. See United States v. Wilson, 420 U.S. 332, 339, 340, 95 S.Ct. 1013, 1019-1020 (1975). The double jeopardy protection is enforced principally through restraining courts and prosecutors in matters implicating second trial proceedings. Brown v. Ohio, 432 U.S. 161, 165, 97 S.Ct. 2221, 2225 (1977). As recognized in United States v. Wilson, 420 U.S. at 346, 95 S.Ct. at 1023, the "controlling constitutional principle" of double jeopardy focuses on the prohibition against multiple trials.

> At the heart of this policy is the concern that permitting the sovereign freely to subject the citizen to a second trial for the same offense would arm Government with a potent instrument of oppression. The Clause, therefore, guarantees that the State shall not be permitted to make repeated attempts to convict the accused, "thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continual state of anxiety and insecurity as well

as enhancing the possibility that even though innocent he may be found guilty." Green v. United States, 355 U.S. 184, 187-188, 78 S.Ct. 221, 223 (1957); see also Downum v. United Staes, 372 U.S. 734, 736, 83 S.Ct. 1033, 1034 (1963). "[S]ociety's awareness of the heavy personal strain which a criminal trial represents for the individual defendant is manifested in the willingness to limit the Government to a single criminal proceeding to vindicate its very vital interest in enforcement of criminal laws." United States v. Jorn, 400 U.S. 470, 479, 91 S.Ct. 547, 554 (1971)(Harlan, J.).

United States v. Martin Linen Supply Co., 430 U.S. 564, 569, 97 S.Ct. 1349, 1353 (1977)(footnote omitted).6/

6/ The principle that no one shall be put twice in jeopardy for the same offense has been declared by jurists to be part of the universal law of reason, justice, and conscience. See, e.g., United States v. Keen, 27 F.Cas. 510, 686 (No. 15)(1839). Commentators have expressed the view that the right not to be put in jeopardy a second time is as essential as the right to a trial by jury, if not more important. Sigler, Double Jeopardy: The Development of a (fn.Cont.)

Although this double jeopardy protection is variously described and is often misunderstood, the fundamental component of double jeopardy is evident from the seminal decision in United States v. Ball, 163 U.S. 662, 669, 16 S.Ct. 1192 (1896): "The prohibition is not against being twice punished, but against being twice put in jeopardy...." The constitutional protection, then, relates to the risk that an accused for a second time will be convicted of the same offense for which he was initially tried. See Price v. Georgia, 398 U.S. 323, 326, 90 S.Ct. 1757, 1759 (1970).

The protections afforded by the Double Jeopardy Clause begin only when an accused first has been placed in jeopardy. Serfass v. United States, 420 U.S. 377, 95 S.Ct. 1055 (1975). Once jeopardy has attached, the Constitution

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Legal and Social Policy at v (1969).

does not prohibit all second or successive trials. As long ago as 1829, Justice Story, speaking for the court in United States v. Perez, 9 Wheat. 579, 580, 6 L.Ed. 165 (1829), recognized that a **second trial** on the same charges following the declaration of a mistrial for a hung jury is consistent with double jeopardy principles because the parties are entitled to a **determination of the charges**. As declared more recently in Arizona v. Washington, 434 U.S. 497, 509, 98 S.Ct. 824, 832 (1978):

> [W]ithout exception, the courts have held that the trial judge may discharge a genuinely deadlocked jury and require the defendant to submit to a second trial. This rule accords recognition to society's interest in giving the prosecution **one complete opportunity** to convict those who have violated its laws. [Emphasis added].

Even though a retrial in such circumstances has the practical effect of a second prosecution for the same offense,

it is "the policy behind the Double Jeopardy Clause [that] does not require prohibition of the second trial." Jeffers v. United States, 432 U.S. 137, 152, 97 S.Ct. 2207, 2217 (1977).

B. Superseding Indictments -- Limited By Double Jeopardy Protections.

Although the government has broad discretion to lodge charges against an accused, that discretion is not "unfettered" but is limited by constitutional considerations. United States v. Batchelder, 442 U.S. 114, 125, 99 S.Ct. 2198, 2205 (1979); Bordenkircher v. Hayes, 434 U.S. 357, 364, 98 S.Ct. 663, 668 (1978). The Eleventh Circuit decision under review rejects in wholesale fashion any limitation on the prosecution's charging authority even when the defendant has already proceeded to trial.

The concept of "continuing jeopardy" -- totally misunderstood by the appellate court -- is designed to function as a check on government power and prevent the government from doing what it could not do during the course of a single trial: change a charging document. There is no doubt that the government cannot obtain a superseding indictment during the course of a trial once jeopardy has attached. United States v. Cole, 755 F.2d 748, 757 (11th Cir. 1985); United States v. Del Vecchio, 707 F.2d 1214, 1216 (11th Cir. 1983).7/ Continuing jeopardy, quite

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7/ "The term 'superseding indictment' refers to a second indictment issued in the absence of a dismissal of the first." United States v. Rojas-Contreras, __ U.S. __, 106 S.Ct. 555, 559 (1985)(Blackmun, J., concurring). The return of a superseding indictment does not constitute dismissal of an earlier indictment. United States v. Cerilli, 558 F.2d 697, 700 (3d Cir.), cert. denied, 434 U.S. 966, 98 S.Ct. 507 (1977)(where two indictments are out-
(fn.Cont.)

simply, means that the same restrictions control in the event of a hung jury mistrial. That means that a retrial is permissible, but upon the same charges and not some modification designed to bring additional prejudice to the defendants.

At the core of these approved but limited exceptions to the rule prohibiting retrials for the same offense is the principle that a prosecution should run its full course to conclusion. For, while a mistrial in a hung jury situation terminates the trial, it does not end that "prosecution" nor does it conclude the defendant's double jeopardy protections. This was the central theme of the decision in Richardson v. United

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standing against an accused charging same offenses, government may elect upon which indictment to proceed.); United States v. Holm, 550 F.2d 568 (9th Cir.), cert. denied, 434 U.S. 856, 98 S.Ct. 176 (1977).

States, 468 U.S. 317, 104 S.Ct. 3081 (1984), in which this court set forth its view of "continuing jeopardy," a constitutional concept which recognizes that once jeopardy has attached, that same jeopardy continues through a hung jury mistrial until the prosecution is finally terminated. Thus, retrial proceedings following a hung jury are but a part of the original trial -- a continuation of the original jeopardy. The prosecution is permitted, therefore, to continue with a trial only on those charges which are contained within the continuing jeopardy. Thus, in more abstract terms, the retrial is really a part of the original trial. While the government can drop charges during trial or make variations, it cannot substitute new charges or a new indictment. Modification of the same charges in any way other than by reducing them to the

defendant's benefit is unconstitutional. Especially where a superseding indictment includes new charges which are derived from the original underlying crimes and do not stand on their own as independent offenses, retrial on the new charges is tantamount to making the defendant run the gauntlet anew.

The constitutional limitation against superseding indictments following a hung jury is a necessary part of double jeopardy protections. This is especially so where the "new" indictment takes a new look at the case, modifies the charges with a view toward assuring a conviction by eliminating the portions of the original indictment which did not enhance the case, and adds related charges which could not be the subject of a separate prosecution. The sinister aspect of this case is that the government has gone through a process of edit-

ing, revising, and redacting the indictment which is far more than "trivial" or "innocuous." See Stirone v. United States, 361 U.S. 212, 127, 80 S.Ct. 270 (1960); United States v. Colasurdo, 453 F.2d 585, 591 (2d Cir. 1971), cert. denied, 406 U.S. 917, 92 S.Ct. 1766 (1972), quoting Russell v. United States, 369 U.S. 749, 770, 82 S.Ct. 1038 (1962). This case does not present a legal issue involving a restatement of the original charges and then the addition of distinct charges of a different genre. See United States v. Edwards, 777 F.2d 644, 649 (11th Cir. 1985)(prior to jeopardy attaching, tax charges were added to an indictment previously charging only drug related offenses); Howard v. United States, 372 U.S. 294, 299-300 (9th Cir.), cert. denied, 388 F.2d 915, 87 S.Ct. 2129 (1967)(superseding indictment added new counts of preparation of

false tax returns involving different taxpayers). The law as explained by the Eleventh Circuit in rejecting constitutional limitations on the power of the prosecution to charge crimes effectively eliminates the constitutional caveat offered by the court in Arizona v. Washington, 434 U.S. at 508 n.24, 98 S.Ct. at 832 n.24: "The prohibition against double jeopardy unquestionably forbids the prosecutor to use the first proceeding as a trial run of his case."8/

8/ In Green v. United States, 355 U.S. 184, 187-188, 78 S.Ct. 221, 223-224 (1957), the court explained:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment,

(fn.Cont.)

The continuing jeopardy limitation at issue before this court is but a constitutional focus for the established rule that the double jeopardy clause precludes the government from placing a defendant in jeopardy more than once by subdividing a single charge into multiple charges and pursuing successive prosecutions. See United States v. Vaughan, 715 F.2d 1373, 1375 (9th Cir. 1983); United States v. Bendis, 681 F.2d 561, 563 (9th Cir. 1981), cert. denied, 459 U.S. 973, 103 S.Ct. 306 (1982). The failure to follow this constitutional rule is at the heart of the Eleventh Circuit's erroneous opinion. The court viewed this issue as little more than an attempt by the government to join

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> expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

separate charges into a superseding indictment:

> Our conclusion that no double jeopardy problem is implicated here also comports with common sense. It has long been established that a defendant can be retried on the **same** charges following a mistrial. See Richardson, 468 U.S. at 323, 104 S.Ct. at 3085. It is also clear that one who has been either acquitted or convicted of a particular offense can nonetheless be indicted and tried on a **new** offense, so long as the new offense is separate from the previous charge. Therefore, it makes no sense to argue, as defendants do, that the defendants, whose trial ended in a mistrial, can be retried on the same charges, and can be retried on completely separate and additional charges, but cannot be retried on some lesser amendment of the existing charges.

That erroneous belief was exacerbated by footnote 2 of the Eleventh Circuit's decision:

> Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 182 (1931), sets out the test for determining whether or not the new offense is a separate offense.

> Since the additional, new counts of mail fraud and Travel Act violations in this case would satisfy the Blockburger test, a new trial on these charges would clearly be permissible. Defendants have not argued, nor could they on these facts, that joining the new charges with the old charges would violate the standard for joinder of offenses. See Fed.R.Crim.P. 13.

These incorrect pronouncements totally avoid the continuing jeopardy precedent, and place the Eleventh Circuit in a position of eliminating a central tenet of the Double Jeopardy Clause. It is not true that the "new" charges in the superseding indictment stand alone and could be the object of a separate indictment. Rather, the new charges of mail fraud and Travel Act violations -- Counts 4-8 -- are crimes only when they are made a part of the racketeering enterprise. Manifestly, the mere mailing of a document or an interstate travel do not become criminal

acts unless they further the unlawful racketeering scheme, a crime to which jeopardy has attached.

Because the evidence of these "new" offenses is so intertwined with and inseparable from the main racketeering allegations, the rule of compulsory joinder precludes the government from trying charges that were omitted from the first indictment and trial. See Illinois v. Vitale, 447 U.S. 410, 419-421, 100 S.Ct. 2260, 2267 (1980) (standard for evaluating successive prosecutions requires application of the same-actual-evidence test). See also Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 182 (1931) (double jeopardy evaluation for separate punishment for convictions obtained in a single prosecution requires analysis of whether offenses require proof of a fact not required by the other). To conclude

otherwise in a case like this gives the government has carte blanche to do that which was condemned in Garrett v. United States, 471 U.S. 773, 105 S.Ct. 2407, 2417 (1985):

> We do not think that the Double Jeopardy Clause may be employed to force the Government's hand in this manner, however we were to resolve Garrett's lesser-included-offense argument. One who insists that the music stop and the piper be paid at a particular point must at least have stopped dancing himself before he may seek such an accounting.

It is the government in this case that refuses to stop dancing, yet it insists that the jeopardy which it initiated at the start of the original trial now stop and that a new jeopardy begin with the trial of the superseding indictment.

C. Hung Jury Does Not Undo Double Jeopardy Protections.

Solely by reason of the government's calculated actions in this case following the declaration of a mistrial,

the Coronas are in an unusually, and constitutionally dangerous, predicament. The government action is premised on the incorrect view that a hung jury wipes the double jeopardy slate clean, thereby permitting the government to start anew, beginning with the filing of a new charging document. That view is not the law. Rather, a hung jury is but an event in the continuum of proceedings which commence with the attachment of jeopardy and conclude with a jury's unanimous verdict.

A close examination of Richardson demonstrates why the Corona's conclusion is unassailable and the Eleventh Circuit's holding is erroneous. In Richardson, the defendant was indicted on three separate drug charges. The jury acquitted as to one charge but hung as to the remaining two counts. The court declared a mistrial. The defen-

dant argued that retrial was barred by the Double Jeopardy Clause because of insufficient evidence presented at trial. The appellate process was invoked under Abney, but the court of appeals ruled that the defendant's claim was not completely collateral to the merits of the charge against him.

This court rejected the merits of the double jeopardy claim on certiorari review, holding that the clause is not violated by retrial following the failure to adduce sufficient proof to establish guilt beyond a reasonable doubt at a first trial which ends in declaration of a mistrial because of a hung jury. Richardson contended that his position was supported by Burks v. United States, 437 U.S. 1, 98 S.Ct. 2141 (1978), where it was held that once a defendant obtains an unreversed appellate ruling that the government has

failed to introduce sufficient evidence to convict at trial, a second trial is barred by the Double Jeopardy Clause. To evaluate the impact of Burks, in a setting where a mistrial has been granted, now-Chief Justice Rehnquist turned first to cases evaluating the impact of the Double Jeopardy Clause in situations where a mistrial has been declared as a result of a hung jury. United States v. Perez, 9 Wheat. 579, 6 L.Ed. 165 (1824), held that failure of the jury to agree was an instance of "manifest necessity" permitting termination of the first trial and a retrial, because an opposite result would cause "the ends of public justice ... to be defeated." Id. at 580. Since that early opinion, the court has consistently held that retrial following a hung jury does not violate the Double Jeopardy Clause. 104 S.Ct. at 3085.

The court found that the principles governing Burks and the principles underlying the decisions in the hung jury cases were readily reconciled by an evaluation of when and in what instances an event terminates the original jeopardy. 104 S.Ct. at 3086. Richardson's argument necessarily assumed that judicial declaration of a mistrial is an event terminating jeopardy. This conclusion, however, is incorrect and irreconcilable with the legacy of the mistrial cases. The court held that "the failure of the jury to reach a verdict is not an event which terminates jeopardy." 104 S.Ct. at 3086. This is to be contrasted with the situation in Burks, where an appellate determination of legal insufficiency is the equivalent of an acquittal which does terminate jeopardy. The court concluded:

> ...we reaffirm the proposition that a trial court's declaration of a mistrial following a hung jury is not an event that terminates the original jeopardy to which petitioner was subjected. The Government, like the defendant, is entitled to resolution of the case by verdict from the jury, and jeopardy does not terminate when the jury is discharged because it is unable to agree.

104 S.Ct. at 3086.

In Justices of Boston Municipal Court v. Lydon, 466 U.S. 294, 104 S.Ct. 1805 (1984), this court expressly utilized the Richardson continuing jeopardy rule in reaching its decision. Lydon involved the Massachusetts two-tier trial system. In Massachusetts, some charges may be resolved by a bench trial to be followed, at the defendant's choice, by a de novo jury trial on the same charges. The court held that a defendant has no right to review the sufficiency of the evidence at the bench trial prior to electing his choice to

begin anew at a jury trial on the same charges. The court found that the second trial, before a jury, was merely a continuation of the same jeopardy begun by the bench trial. Under the continuing jeopardy rule, double jeopardy is not an absolute bar to successive trials; reprosecution is permitted, for instance, where a defendant's conviction is overturned on appeal. Implicit in this retrial authorization is that the rule permitting retrial after reversal of a conviction is conceptually satisfied by the constitutional notion of continuing jeopardy. That principle is applicable where a criminal proceeding against an accused has not run its full course, as occurs in the case involving the Coronas and permits a retrial on the same charging document.

In Lydon, the proceeding had not run its full course. Society as well as the parties have an interest in reaching a **final resolution** of a dispute. The continuing jeopardy principle permits this. In Lydon, because the defendant elected to continue the proceeding, the jeopardy that had attached to the swearing of the first witness at the bench trial continued into the jury proceeding. Clearly, swearing of the jury at the second trial was not a new instance of jeopardy, rather, original jeopardy proceeded apace from the bench trial. 104 S.Ct. at 1814.

The only conclusion available in light of Richardson is that a superseding indictment following a hung jury constitutes an unconstitutional interference with the jeopardy to which the Coronas have been, and are now being, subjected. The posture of the present

case enhances the risk that innocent defendants may be convicted, which always has been an important ingredient in the double jeopardy analysis. In Casey v. United States, 392 F.2d 810, 813-814 (D.C. Cir. 1967), Circuit Judge Leventhal described how minor changes in the prosecution's evidence, initially favorable to the accused, may occur during the course of multiple prosecutions:

> [T]he Government witnesses came to drop from their testimony impressions favorable to the defendant. Thus a key prosecution witness, the last person to see appellant and the deceased together, who began by testifying that they had acted that evening like newlyweds on a honeymoon, without an unfriendly word spoken, ended up by saying for the first time in four trials that the words between them had been "firm," and possibly harsh and "cross."
>
> We also noted that the police officer who readily acquiesced in the two "hung jury" trials that appellant was "hysterical," later withheld that characterization. This

> shift, though less dramatic, was by no means inconsequential in view of the significance of appellant's condition at the time he made a statement inconsistent with what he later told another officer.

See also Green v. United States, 355 U.S. at 187-188, 78 S.Ct. at 223 (repeated attempts to convict person for same offense enhances possibility of convicting the innocent). The Constitution "forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." Burks v. United States, 437 U.S. at 11, 98 S.Ct. at 2147. Viewed in this light, this court cannot allow the government to convert a hung jury into a situation which permits it to reprosecute the Coronas on a new, broadened and amended indictment.

CONCLUSION

For the above-stated reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail this 10th day of March 1987 to Solicitor General, U.S. Department of Justice, Washington, D.C. 20530, and Thomas Blair and Daniel Cassidy, Assistant United States Attorneys, 155 South Miami Avenue, Miami, Florida 33130-1693.

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